



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 24, 2023

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BOARD DECISIONS

Appellant: Cory Owens
Agency: Department of Homeland Security
Decision Number: [2023 MSPB 7](#)
Docket Number: PH-0752-16-0349-I-1
Issuance Date: February 22, 2023
Appeal Type: Physical Inability to Perform

PHYSICAL INABILITY TO PERFORM RESTORATION TO DUTY NEXUS

The appellant was removed from his WG-10 Electrician position for physical inability to perform and excessive absences after he sustained a work-related injury. The administrative judge reversed his removal, finding that the appellant fully recovered from his injury while the removal appeal was pending, and he ordered the agency to reinstate the appellant to the Electrician position, effective to the date of the removal. Because the administrative judge reversed the appellant's removal, he did not address the restoration claim. The agency filed a petition for review, asserting that the administrative judge erred in finding that the appellant is entitled to

restoration to his previous position as a result of his recovery. The appellant filed a petition for enforcement of the interim relief order.

Holding: When an appellant presents unambiguous evidence of complete recovery from the medical condition that resulted in his removal before the administrative judge has issued an initial decision in his removal appeal, the removal action does not promote the efficiency of the service.

1. The Board's regulations do not provide for petitions for enforcement of interim relief orders; such petitions only apply to final Board decisions.
2. The Board did not consider the agency's argument that the appellant's initial appeal was untimely because the argument was raised for the first time on review and the agency did not establish that it was based on new and material evidence that was not previously available.
3. The Board held that regulations governing the restoration rights of employees who recover from a compensable injury were not relevant to the propriety of the appellant's removal for physical inability.
4. Rather, the Board held that it is well settled that the "efficiency of the service" standard of 5 U.S.C. § 7513(a) is the "ultimate criterion" for determining whether any discipline is warranted and whether a particular penalty may be sustained. When an appellant presents unambiguous evidence of complete recovery from the medical condition that resulted in his removal before the administrative judge has issued an initial decision in his removal appeal, the removal action does not promote the efficiency of the service.
5. Member Leavitt issued a dissenting opinion.

Appellant: Randall S. Desjardin

Agency: U.S. Postal Service

Decision Number: [2023 MSPB 6](#)

Docket Number: SF-0353-15-0241-I-1

Issuance Date: February 22, 2023

Appeal Type: Restoration to Duty

RESTORATION TO DUTY REMEDIES

The appellant is employed by the agency as a City Carrier. On December 11, 2014, he submitted a request to return to work following a compensable injury. He included a medical note completed by his doctor, which identified his medical restrictions. On January 7, 2015, the appellant filed a Board appeal challenging the agency's failure to restore him to duty. The agency asserted that it had conducted two searches for available work. As to the first

search, the agency conceded that it did not conduct a full search of the local commuting area. The second search was based on restrictions that differed from the appellant's medical documentation. After filing this appeal, the appellant accepted a series of modified limited-duty assignments.

After a hearing, the administrative judge issued an initial decision granting the appellant's request for restoration, in part. She found that the agency's initial search was inadequate because it failed to include the entire local commuting area and was based on incorrect medical restrictions. She further found that the appellant's partial restoration to work in January 2015 was so unreasonable as to amount to an arbitrary and capricious denial of restoration. She found that there were at least 2 hours of work available daily within the appellant's medical restrictions from the time he submitted his restoration request in December 2014. Accordingly, she ordered the agency to pay the appellant back pay and benefits for 2 hours per day for the period during which his request for restoration was denied in its entirety and to conduct a proper search for available work retroactive to December 12, 2014.

The administrative judge found that the appellant failed to show that the agency denied him a reasonable accommodation and that he failed to prove his affirmative defenses of disability discrimination, sex discrimination, and retaliation for equal employment opportunity activity, whistleblowing, and union activities. She also found that he failed to show any harmful error separate from the merits of his restoration claim. The appellant filed a petition for review and the agency filed a cross petition for review.

Holding: The agency violated the appellant's restoration rights under 5 C.F.R. § 353.301(d) only to the extent it failed to conduct a proper search for vacant positions.

1. Because partially recovered employees do not have an unconditional right to restoration, they do not have the right to appeal every denial of restoration.
2. Under *Cronin v. U.S. Postal Service*, 2022 MSPB 13, the Board's sole jurisdictional inquiry in an appeal alleging an arbitrary and capricious denial of restoration to a partially recovered employee is whether the agency complied with its obligations under 5 C.F.R. § 353.301(d) to search within the local commuting area for vacant positions to which it can restore the employee and to consider him for such vacancies.
3. Under *Cronin*, the agency's efforts to find work that did not constitute the essential functions of an established position cannot form the basis of a restoration claim before the Board.
4. The Board vacated the administrative judge's findings that the agency's

actions in connection with its search for modified duties constituted an arbitrary and capricious denial of restoration within the Board's jurisdiction.

5. However, the Board found that the agency violated its obligation under 5 C.F.R. § 353.301(d) to search the local commuting area for vacant positions to which it could restore the appellant because its search did not encompass the entire local commuting area and used incorrect medical restrictions.

Holding: When the Board finds that an agency has violated 5 C.F.R. § 353.301(d), the proper remedy is for the agency to conduct an appropriate search of the local commuting area retroactive to the date of the appellant's request for restoration and to consider him for any suitable vacancies.

1. The appellant may be entitled to back pay only if the agency's retroactive search uncovers a position to which it could have restored him. The appellant's union duties are not themselves a position to which he could have been reassigned.
2. The Board vacated the administrative judge's order for the agency to pay the appellant for 2 hours per day during the period in which his request for restoration was denied.

Holding: The appellant did not prove his affirmative defenses.

1. In connection with denials of restoration over which the Board has jurisdiction, it will adjudicate discrimination and retaliation claims as affirmative defenses and not as "independent claims."
2. Findings by the Equal Employment Opportunity Commission (EEOC) in a class action appeal that the agency committed disability discrimination in the past is not dispositive to the outcome of the disability discrimination issue in this appeal because the Board has jurisdiction over different matters than the EEOC and because the findings in the EEOC case relate to a different time period. The appellant failed to prove his disability discrimination defense.
3. The appellant failed to prove his affirmative defenses of discrimination based on sex and retaliation for prior equal employment opportunity activity.
4. The appellant's claims of harmful procedural error and retaliation for whistleblowing and union activities are moot because the appellant is entitled to corrective action on the merits of his restoration claim.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: John Kluge

Respondent: Department of Homeland Security

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2021-1787](#)

MSPB Docket No.: DC-4324-20-0246-I-1

Appeal Type: Pay and Benefits

The petitioner is a commissioned officer in the U.S. Army Reserve and a civilian employee of the Department of Homeland Security (DHS). From January 15 through July 30, 2011, the petitioner was absent from his DHS job because he was ordered to active duty under 10 U.S.C. § 12301(d), which provides for voluntary active duty of reservists. For the first few weeks of this period, the petitioner was on paid military leave and, from February 27 until July 30, 2011, the petitioner was on unpaid leave, except for the July 4 holiday. The petitioner filed a Board appeal seeking to recover differential pay for himself and similarly situated service members employed by the Federal government, naming the Office of Personnel Management (OPM) as the respondent. In an initial decision, which later became final, the administrative judge denied class certification, substituted DHS for OPM as the respondent, and found that DHS owed him \$274.37 plus interest for differential pay. The petitioner filed an appeal.

Holding: The administrative judge did not abuse her discretion in denying class certification.

1. The court stated that the Board is not bound by Federal Rule of Civil Procedure (FRCP) 23 in determining whether to grant or deny class certification. Rather, the Board's regulation at 5 C.F.R. § 1201.27(c) states that the FRCP guide, but do not control, the administrative judge's decision. Under 5 C.F.R. § 1201.27(a), an administrative judge should "hear the case as a class appeal if . . . she finds that a class appeal is the fairest and most efficient way to adjudicate the appeal."
2. The court agreed with the administrative judge that the proposed class lacked commonality and that it would not be efficient to determine class membership.
3. Although the court disagreed with the administrative judge's finding that certification of the class would require revealing private pay information of all class members to all other class members, the court found that this erroneous finding, alone, does not support a finding that

the administrative judge abused her discretion in denying class certification.

Holding: The administrative judge correctly found that DHS, rather than OPM, was the proper party to respond to the petitioner's differential pay claim.

1. DHS was the proper respondent because it was the petitioner's employing agency and had access to his employment records.
2. 38 U.S.C. § 4324 does not provide the petitioner with a right of action against OPM based on alleged incorrect guidance which, at the time, stated that "qualifying active duty does not include voluntary active duty under 10 U.S.C. [§] 12301(d)." There were no plausible allegations that the petitioner, or anyone else, was ever denied differential pay due to OPM's guidance.

Holding: The petitioner failed to show that the administrative judge violated 5 U.S.C. § 5538 in calculating his differential pay.

1. 5 U.S.C. § 5538 provides that differential pay should be calculated by determining the difference between civilian pay for a pay period and the military pay allocable to that pay period.

NONPRECEDENTIAL:

Kristof v. Department of the Air Force, No. [2021-2033](#) (Fed. Cir. Feb. 23, 2023). The court affirmed the Board's decision upholding the petitioner's indefinite suspension without pay pending a final decision regarding his eligibility for a security clearance.

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